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Department of Justice Issues New Corporate Charging Guidelines

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On August 28, 2008, Deputy Attorney General Mark R. Filip announced revisions to the Department of Justice's *Principles of Federal Prosecution of Business Organizations (Revised Principles)*, published in the United States Attorneys' Manual. This section of the Manual specifies the DOJ's policy of how it will measure a corporation's cooperativeness in a criminal investigation and how the DOJ determines whether the entity itself should be charged with a crime.

The *Revised Principles* make the following changes to the DOJ's policy: (1) the credit a corporation receives for cooperating with a federal criminal investigation will not be influenced, positively or negatively, by whether the corporation has waived the attorney-client privilege or work product protection; (2) prosecutors may not ask for privileged or work product information, except in very limited situations, as described below, returning the policy to the traditional view in effect until about six years ago; (3) in determining whether a corporation has been cooperative in a federal criminal investigation, prosecutors may not give consideration to whether the corporation is paying attorneys' fees for its employees or management; and (4) prosecutors may not consider whether a corporation is a party to a joint defense agreement in determining whether the corporation is being cooperative in the Government's investigation.

The *Revised Principles* govern the DOJ's process of investigating, charging and prosecuting corporate crimes. The *Principles of Federal Prosecution of Business Organizations* were amended in December 2006 when U.S. Deputy Attorney General Paul J. McNulty issued what has been referred to as the "McNulty Memorandum." The McNulty Memorandum, a successor to earlier versions of the *Principles*, known successively as the Holder Memorandum and the Thompson Memorandum, has been criticized for, among other things, leading corporate counsel to speculate as to whether the corporation would have to waive its attorney-client privilege in order to receive from prosecutors full credit for cooperation with a federal criminal investigation, in an effort to maximize prospects for avoiding criminal indictment of the corporate entity.

Under the *Revised Principles*, the DOJ will no longer demand, require or even consider waiver of the attorney-client privilege and attorney work product confidentiality in the context of corporate internal investigations. When a corporation suspects criminal activity in its ranks or the company is being investigated for possible criminal activity, the entity commonly retains outside counsel to conduct an internal investigation. Corporations use the results of these investigations to determine whether crimes have been committed and who within the corporation was negligently or intentionally at fault. Outside counsel advises the entity of corrective action that should be taken to prevent reoccurrence.

While corporate internal investigations are designed to discover facts, they are conducted in the context of a corporation's communicating freely with its counsel under the confidentiality assured by the attorney-client privilege. Analysis and conclusions reached during the investigation are confidential as attorney work product. Corporations ideally can cooperate with prosecutors by disclosing factual findings of the corporate investigation while holding on to the content of attorney-client privileged communications between corporate management and counsel.

Under the McNulty Memorandum, line prosecutors could request that the corporation waive the privilege and disclose these attorney-client communications if the line prosecutor demonstrated to his or her superiors at DOJ that there was a "legitimate need" to make this request of the corporation. If the prosecutor satisfied this showing of a "legitimate need" for the privileged material, and the prosecutor asked the corporation for the privileged information, under the express wording of the McNulty Memorandum, this could not be counted against the corporation in the Government's determination of whether the corporation was being cooperative. However, under the McNulty Memorandum, the corporation's waiver could be weighed positively in this regard: "Prosecutors may always favorably consider a corporation's acquiescence to the Government's waiver request in determining whether a corporation has cooperated in the Government's investigation."

The *Revised Principles* bar prosecutors from requesting or giving credit to a corporation for offering its privileged or confidential work product information. The *Revised Principles* emphasize to prosecutors that the corporation should gain credit by cooperating with the Government's investigation if the corporation, in a timely fashion, discloses the *facts* discovered during its internal investigation, which help the Government more readily answer ultimate questions: (1) How did the misconduct occur? (2) When did the misconduct occur? (3) Who promoted or approved of the misconduct? (4) Who was responsible for the misconduct?

According to the *Revised Principles*, "Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct." The *Revised Principles* give the example of interviews of corporate employees conducted by counsel during the internal investigation. "To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by lawyers' interviews. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews…."

In addition to disclosing the facts discovered by the corporation's internal investigation, the corporate entity may demonstrate its cooperation, according to the *Revised Principles*, by "providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records."

The *Revised Principles* also regard as off limits for prosecutors any communications by corporate employees, officers and directors with corporate counsel as to the "legal implications of the putative misconduct at issue [in the Government's investigation]." These privileged communications will not be requested by prosecutors unless the corporation or employee asserts an advice-of-counsel defense. Moreover, as always (long before the Holder, Thompson or McNulty Memoranda), communications between a corporate officer, employee director or agent and corporate counsel "in furtherance of a crime or fraud" are not privileged, according to the crime-fraud exception to the attorney-client privilege.

Under the *Revised Principles*, DOJ will no longer consider whether the corporation has advanced legal fees to its employees, as a measure of the corporation's cooperativeness in the Government's investigation. The McNulty Memorandum perpetuated a cloud of uncertainty as to whether a corporation would be viewed by DOJ as uncooperative with the Government's investigation or expose itself to greater risk of being charged with a crime if the entity fronted legal fees for employees deemed by the Government to be "culpable." The McNulty Memorandum excused the corporation for fronting these fees where the corporation was bound by statute or contract to do so. Only in "extremely rare cases," where "the totality of the circumstances" indicated that the advancement of fees was "intended to impede the investigation," could the line prosecutor seek the Deputy Attorney General's approval to consider this factor in the charging decision.

One of the problems with this criterion was that corporations and the Government often make different determinations as to whether a particular employee is "culpable." Moreover, companies often, regardless of any statutory or contractual obligation to do so, consider it proper to assure a corporate employee is afforded competent legal counsel.

The *Revised Principles* eliminate fee advancement from the set of relevant factors in the Government's decision as to whether the corporation is being cooperative in the Government's investigation. Prosecutors "should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers or directors under investigation or indictment." Prosecutors are directed not to request that a corporation refuse to pay fees for the individual's counsel. These rules expressly do not apply where "the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false…."

It is interesting that the *Revised Principles* were published one day after the Second Circuit Court of Appeals affirmed the dismissal of an indictment against former KPMG partners in *United States v. Stein*. The Second Circuit agreed with the District Court's determination that federal prosecutors, aware of KPMG's motivation to show full cooperativeness with the federal investigation and to avoid prosecution, influenced KPMG to place conditions and caps on KPMG's advancement of legal fees to its former partners who were defendants in the criminal case. The Second Circuit agreed that, by these actions, federal prosecutors had deprived the defendants of their right to counsel under the Sixth Amendment.

Under the proposed changes, the DOJ will no longer consider whether a corporation has entered into a joint defense agreement with its employees. Companies in the midst of a Government investigation often enter into joint defense agreements with employees who are subjects or targets of the Government's investigation, in order to share information between company counsel and counsel for the employee under an expanded privileged arrangement. These agreements allow employees and their companies to share information and strategies as they commonly face the formidable resources of the federal Government during an investigation.

Under the McNulty Memorandum, a company's joint defense agreement with "culpable" employees "may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." This, of course, pressures the corporation to reach the same conclusions with respect to employee culpability as the Government reached and results in corporations' avoiding joint defense agreements that might well otherwise facilitate the detection and deterrence of criminal wrongdoing.

The *Revised Principles* eliminate this factor as well: "[T]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements."

This revision to the DOJ's policy under the McNulty Memorandum reserves the Government's right to provide certain information to the corporation in the midst of an investigation under the condition that the shared information not be passed along to employees under a joint defense agreement: "In appropriate situations, as it does with individuals, the Government may properly request that, if a corporation wishes to receive credit for cooperation, the information provided by the Government to the corporation not be transmitted to others—for example, where the disclosure of such information would lead to flight by the individual subjects, destruction of evidence, or dissipation or concealment of assets."

The *Revised Principles*, surprisingly, apparently leave in place the DOJ's policy of taking into consideration the corporation's punishment of employees in the Government's measurement of the

entity's cooperativeness in the Government's investigation. Under the McNulty Memorandum, prosecutors were instructed that they "must consider" the corporation's actions "to discipline or terminate wrongdoers" in the Government's decision of "the proper treatment of a corporate target." McNulty regarded the company's action or inaction in "disciplining wrongdoers" as relevant to the Government's decision of whether the entity should be indicted. Like the McNulty Memorandum's provisions on attorney fees and joint defense agreements, this pressures the company to agree with the Government's categorization of employees as culpable or not.

It was expected that these provisions would be eliminated from the DOJ's policy. In a July 2008 letter to Senator Patrick Leahy, Deputy Attorney General Filip represented that employee discipline would be eliminated from the Government's charging decision: "Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation." Filip qualified that this may be relevant to the quality of the company's remedial measures or its compliance program, but "will not be taken into account for the purpose of evaluating cooperation."

According to remarks by Deputy Attorney General Filip when he announced the changes on August 28th, "[P]rior guidance allowed prosecutors to consider whether a corporation disciplined or terminated employees for the purpose of evaluating cooperation. That is now disallowed. Prosecutors may only consider whether a corporation has disciplined employees *that the corporation identifies as culpable*, and only for the purpose of evaluating the corporation's remedial measures or compliance program."

However, it is not clear that the *Revised Principles* accomplish the Deputy Attorney General's stated intent. The *Revised Principles* continue to allow prosecutors to consider a corporation's "disciplining [of] wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases." The only change on this issue is a tacit recognition that the Government and the corporation may identify the band of wrongdoers differently: "Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers, *once the employees are identified by the corporation as culpable for the misconduct*."

Legislation may make these changes permanent. The President of the American Bar Association, H. Thomas Wells Jr., in a statement released the day the *Revised Principles* were published, applauded the changes, but urged that the Attorney-Client Privilege Protection Act be passed to make these changes more permanent, in statutory form. The proposed Act has been approved by the House (H.B.3013). The proposed Act is pending in the Senate, in the form of S.3217.

The proposed Act is also significant in that the *Revised Principles*, although they are the stated policy of DOJ, can not be strictly enforced by defendants if prosecutors deviate from the policy according to a line of cases over recent years.

Conclusion. The *Revised Principles* address the major threats to the preservation of a corporation's attorney-client privilege and work product confidentiality in the context of corporate internal investigations, while strengthening an employee's ability to prepare his or her own defense, with the benefit of counsel, whose fees are paid for by the company, as well as the sharing of information under the confidentiality of a joint defense agreement.